Themis has been premature. He was bound by the terms of his contract, in the first place to take his case to his own Gods who preside over the Working Committee of the Indian Congress. That was a condition precedent to any cause of action he might have for the breach of the contract between himself and the President or any other of his fellow members. I am thus compelled to take the view that Ong J. was right in dismissing the action and for myself I would dismiss the appeal against his decision with costs.

Hill J.A. and **Ismail Khan J.** concurred.

Appeal dismissed.

Solicitors: *R. R. Chelliah; Nahappan & Co.*

PONNIAH v. CHINNIAH

[C. A. (Thomson C.J., Good and Neal JJ.) May 27, 1959]

[J. B. — F.M. Civil Appeal No. 50 of 1958]

Land Laws — Charge — Johore Land Enactment — Refusal of chargee to grant discharge — Johore Land Rules 1929, r.37 — Jurisdiction of Court — Federation of Malaya Constitution, Arts.121, 172 — Admission of evidence to establish oral agreement — Evidence Ordinance, 1950, s.92.

The respondent charged his land to the appellant by way of security for a loan of $6,750. Upon the refusal of the appellant to grant a discharge of the charge when the loan had been repaid, the respondent applied for an order directing the appellant to grant such a discharge or alternatively that the Commissioner of Lands for Johore or the Collector of Land Revenue at Kluang should be ordered to discharge the charge and make the necessary consequential memorial on the document of title. The respondent alleged at the trial that part of the repayment was made in pursuance of further oral agreement made between the two parties whereby the respondent agreed to pay the appellant a share in the profits of a building project which the respondent was carrying out on his land with the aid of the borrowed money. The learned trial Judge refused to allow evidence to be given of this oral agreement on the ground that it was evidence to vary the terms of the original loan agreement. On appeal,

Held: (1) the Court has jurisdiction to deal with the matter;

(2) evidence of the oral agreement was wrongly excluded, it not being within the ambit of section 92 of the Evidence Ordinance.

COURT OF APPEAL.

A. N. Mitra for the appellant.

R. Murugason for the respondent.

Cur. Adv. Vult.

Thomson C.J.: The respondent to this appeal is the registered proprietor of country land some six acres in extent in the State of Johore and on 6th May, 1958, he applied by way of Originating Summons for certain reliefs in connection with a charge on the land which he had granted in favour of the appellant on 9th January, 1955.

I would observe *in limine* that the respondent was asking for the discharge of a charge of land which is the equivalent under our land laws of a reconveyance of mortgaged property and it was therefore open to him to proceed by way of Originating Summons under Order LV rule 5A. His solicitor, however, must have been well aware that there was a dispute as to the facts of the case and in the circumstances the proceedings should have been commenced by Writ (see *White Book*, 1959, p. 1503). In my view this was not in itself fatal to the respondent's case but if it has involved any extra costs, as it may have done in the circumstances of the present case, these should be borne by the respondent in any event.

The respondent's case was that a few days prior to 9th January, 1955, the appellant agreed to lend him $6,750 without interest for a period of six months. The money was paid and on 9th January, 1955, he executed a charge over his land in accordance with the provisions of the Johore Land Enactment setting out the terms of the previous oral agreement and charging his land by way of security for the loan. On 9th July, 1955, when the loan became repayable he had only paid $600. Subsequently, however, he paid sums amounting to $6,150 in satisfaction of the balance of the loan and the appellant having refused to grant a discharge of the charge he asked for an order directing the appellant to grant such a discharge or alternatively that the Commissioner of Lands for Johore or the Collector of Land Revenue at Kluang should be ordered to discharge the charge and make the necessary consequential memorial on the document of title.

The appellant admitted the terms of the oral contract of loan and after some preliminary lying he admitted that he had received $6,750 in all from the respondent. He alleged, however, that when the loan was not repaid on 9th July, 1955, the respondent asked him for further time to pay and that he agreed to this on consideration of the respondent agreeing to pay him a share in the profits of a building project which the respondent was carrying out on his land with the aid of the borrowed money. In his affidavit he was very vague as to the details of this agreement but he alleged that a number of the payments subsequently made to him by the respondent were made in pursuance of it and not in repayment of the original loan in respect of which the charge had been granted.

In the event the trial Judge refused to admit evidence of this alleged oral agreement on the ground that it was evidence to vary the terms of the original loan agreement and granted the respondent the relief for which he asked.

Against that decision the appellant has now appealed.

His first ground of appeal is that the Court had no jurisdiction to deal with the matter. He based his argument on rule 37 of the Johore Land Rules, 1929, which provides that where a charge in respect of country land not exceeding 100 acres is alleged to have been satisfied but the signature of the chargee as to such satisfaction cannot be procured the owner of the land may apply to the Commissioner of Lands to exercise his powers under section 54 of the Land Enactment and that the Commissioner shall after due inquiry make such order as to the cancellation or otherwise of the charge as he may think fit.

I would express no opinion as to whether the rule in question does indeed give the Commissioner power to deal with a case like the present one. The Court, however, possesses unlimited civil jurisdiction (see Articles 121 and 172 of the Constitution and Clause 77 of the Federation of Malaya Agreement), and in the absence of any express provision in any Enactment (and I have been unable to discover any) it seems impossible to argue that the rule quoted gives the Commissioner of Lands in Johore such exclusive jurisdiction in the matter as to oust the jurisdiction of the Court.

The second ground of appeal, however, has in my mind more substance and is to the effect that evidence of the oral agreement subsequent to 9th July, 1955, was wrongly excluded.

The appellant's real case was that some of the money paid by the respondent was paid in pursuance of this agreement and was not to be credited to the original loan. It may be that looking at the affidavits and the correspondence which is in evidence he would have had some difficulty in convincing any Court that this was so. Nevertheless if that was his case he was entitled to attempt to make it out. There is nothing in the second agreement which in any way varies the terms of the first agreement. Under the first agreement which was reduced to writing the respondent promised to pay $6,750 on 9th July, 1955. If he did so or if he paid off the loan at any subsequent date before the charge was enforced he was entitled to have the charge discharged. The subsequent oral agreement alleged by the appellant whereby in consideration of some sort of remuneration he agreed to refrain from enforcing his undoubted rights under the earlier written agreement did not vary the terms of the written agreement in any way.

The two agreements were entirely separate and distinct. It was not a case of the oral agreement being *prima facie* caught by section 92 of the Evidence Ordinance and it being for the party setting it up to show that it was rescued from inadmissibility by one of the provisoes to that section. The truth is that the oral agreement never came within the ambit of section 92 and was therefore never in need of rescue. In the circumstances evidence of the oral agreement was clearly admissible. That evidence might not have been believed. That is beside the point. It should have been admitted and heard.

I would, therefore, allow the appeal and order a new trial. In all the circumstances of the case, however, I would order that the costs of the appeal and the costs of the first trial should abide the event of the new trial.

Good J.: I have had the advantage of reading the learned President's judgment which I am in complete agreement. I have nothing more to add.

Neal J.: In this appeal I have had an opportunity of reading the Judgment of the learned Chief Justice. I agree that the appeal must be granted and that there must be a rehearing upon the terms therein stated. I agree also with the reasons stated and wish to add nothing thereto.

Appeal allowed.
New Trial ordered.

Solicitors: *A. N. Mitra; Murugason & Co.*

KOH YIN CHYE v. LEONG KEE NYEAN

[O. C. J. (Smith J.) March 20, 1960]

[Ipoh — Election Petition No. 4 of 1959]

Elections — Petition to declare election void — Election Offences Ordinance, 1954, s.10(a) — Promise to pay $1,000 for charity for use within constituency if elected — Whether a corrupt practice.

Section 10(a) of the Election Offences Ordinance 1954 reads: ".....every person who.....promises..... any money . . . . . for any elector or voter in order to induce any elector or voter to vote shall be deemed guilty of the offence of bribery".

Held: a general promise to give $1,000 a month for the purpose of charity or welfare within the constituency constitutes an infringement of the section.

ELECTION PETITION.

S. P. Seenivasagam (*D. R. Seenivasagam* with him) for the petitioner.

T. E. Atkinson (*Ng Lin Hong* with him) for the respondent.

Cur. Adv. Vult.

Smith J.: This is a petition by a person who voted at the Election for the Kampar Parliamentary Constituency held on August 19th, 1959. The petitioner prays that the election of the successful candidate, Mr. Leong Kee Nyean, should be declared void on the ground that he has committed corrupt practices of which the following are the particulars:—

(1) Between the date of nomination and day of polling offered to the electors, voters and people of the Parliamentary Constituency of Kampar a sum of $1,000 per month in order to induce the electors and voters of the said Constituency to vote for the said Leong Kee Nyean the respondent.

(2) On or about the 5th day of August, 1959, corruptly made a gift of $1,000 to the Chinese Burial Ground Organisation, Malim Nawar, in order to induce the electors and voters of the said Kampar Constituency to vote for the said candidate Leong Kee Nyean the respondent.

(3) Between the date of nomination and the date of polling did cause to be published and/or distributed advertisements and handbills which referred to the said election but did not bear upon their face the names and addresses of their printers and publishers.

It is convenient to deal with each of these charges separately, and I will do so in the reverse order.

With regard to the third charge there is no doubt that during the election campaign there